In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-219

HAROLD VINCENT TOLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the search of his vehicle was unlawful because it was made without a warrant and was based upon information received from a informant who "never personally had any dealings with the petitioner in counterfeit or altered coins" (Pet. 6).

After a non-jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of possessing counterfeit gold coins and altered United States coins, in violation of 18 U.S.C. 485 and 331. He was sentenced to concurrent terms of two and one-half years' imprisonment. The court of appeals affirmed (Pet. App. A7).

1. The evidence, adduced at trial and at a pre-trial hearing on petitioner's motion to suppress, showed that on December 14, 1972, undercover Secret Service Agent MacVean Sweazey entered an antique shop owned by Alva Burchett, Jr., in Guthrie, Kentucky, and observed on display two gold coins. Burchett admitted to Sweazey that the coins were counterfeit and asked if he was interested in purchasing them. Sweazey replied that he was not but was prepared to place an order for bogus coins at a later date (Tr. 103-104).[1]

On December 27, Sweazey, accompanied by another undercover agent, again visited Burchett's store. This time they saw ten United States coins in a showcase. Burchett stated that all but two had been altered. Sweazey made a purchase of one counterfeit coin and one altered coin and indicated that if he was satisfied with these, a larger order would follow. Burchett disclosed that he could obtain unlimited quantities of such coins within ten days to two weeks of an order (Tr. 105-106, 205-206). On January 26, 1973, Sweazey placed an order for 107 counterfeit gold coins (Tr. 107-108).

On February 6, 1973, a confidential informant reported to Agent Russell Lasey that he had been told by Burchett that petitioner would be making a delivery of counterfeit coins to Guthrie from Manchester, Tennessee on the morning of February 8 (Tr. 54-55; H. 20-21). Lasey and other Secret Service agents mapped out the route most likely to be taken on such a trip. On the morning of February 8 he stationed men along the designated route. At 7:30 a.m. Lasey and Agent Harold Bibb observed petitioner exit his house and place a black bag and several

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[1]We are lodging with the Clerk of the Court the two-volume transcript of trial ("Tr.") and the one-volume transcript of the pre-trial hearing ("H.").

cartons in his car (H. 24). Lasey, Bibb, and other agents kept petitioner under constant surveillance as he left his house at 8:00 a.m. and proceeded as expected along the most direct route northwest from Manchester, in the middle of Tennessee, toward Guthrie, situated just across the border with Kentucky. When petitioner stopped at a roadside trash container, about five miles south of Guthrie, the agents arrested him and conducted a search of his car. They found therein the black case containing 185 counterfeit gold coins and 18 altered pennies. In addition, the agents discovered a coin book containing five counterfeit gold coins and 39 altered pennies[2] and an address book with an entry for Alva Burchett (Tr. 6-12, 38-39). Telephone toll records reflected the fact that petitioner had called Burchett frequently during December, January, and February (Tr. 158-161).

2. Petitioner claims that the warrantless search of his vehicle was unlawful because the agents relied upon uncorroborated "information * * * from an undisclosed source" (Pet. 6) who had no direct dealings with petitioner in counterfeit or altered coins and because the agents could have obtained a warrant to search the moving vehicle.

a. The informant had been associated with Agent Lasey for only three months before petitioner's arrest. Understandably, during that brief period no convictions had resulted from the use of the information received from the informant. However, the reliability of a confidential informant has never been deemed to depend necessarily upon prior convictions resulting from his information in the past. Here, according to Agent Lasey, "every piece of information received [from this inform-

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[2]All of the pennies had been altered by the addition of a "mint mark," *i.e.*, a letter placed next to the date on the coin, which customarily enhanced its value (Tr. 125, 141).

ant] was verified" (H. 29-30). Accordingly, when the informant passed along his information regarding petitioner and revealed that his own source was Burchett, the Secret Service--which had long suspected petitioner of dealing in counterfeit coins (H. 21-22) and knew from independent personal observations that Burchett was so involved--had ample reason to investigate. The surveillance of the petitioner, which verified the informant's information, provided probable cause to believe that petitioner was transporting counterfeit and altered coins to Burchett. *United States* v. *Harris*, 403 U.S. 573; *Spinelli* v. *United States*, 393 U.S. 410; *Aguilar* v. *Texas*, 378 U.S. 108; *Draper* v. *United States*, 358 U.S. 307; *United States* v. *Burch*, 471 F.2d 1314 (C.A. 6).[3]

b. The information received from the informant before it was verified by surveillance of petitioner was inadequate to support the issuance of a search warrant. It was only after petitioner had been seen loading his vehicle, departing at about the predicted time, and traveling on the most direct course to Guthrie, that the Secret Service agents clearly were justified in believing that petitioner was committing an offense. They were not required to wait until petitioner actually had arrived in Guthrie prior to stopping him, since the requisite probable cause existed before the vehicle reached its destination point. Nor were the agents required to obtain a warrant before arresting petitioner and searching his movable vehicle at the roadside five

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[3]In *Burch* the court of appeals set forth seven items known to the police, including the confidential informant's personal dealings with the defendant, and concluded that in light of this information there was probable cause to believe that the defendant was violating the narcotics laws at the time of his arrest. The court did not indicate, as petitioner suggests (Pet. 6), that probable cause would not have existed in *Burch* if there had been no direct dealings between the defendant and the informant.

miles from Guthrie. *Chambers* v. *Maroney*, 399 U.S. 42; *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132; see *United States* v. *Summerville*, 477 F.2d 393 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11